In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-911

LESLIE S. KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner, a doctor, was convicted on five counts of mail fraud and one count of conspiracy to commit that offense (18 U.S.C. 1341, 371), stemming from a scheme involving the planning of fake automobile and pedestrian accidents and the submission of false medical reports to insurance companies. He was sentenced to concurrent prison terms of three years and fined $15,000. The court of appeals affirmed the conviction and sentence on all counts but one (count 12) (Pet. App. A). The only issue presented here is whether the error on which the court of appeals reversed peti-

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tioner's conviction on count 12 also affected the validity of the conviction on the remaining counts.

1. Following the conviction, petitioner made a motion for a new trial based on newly discovered evidence in which he claimed that the government had knowingly permitted an accomplice witness (Ward), a thrice-convicted felon, who was the principal witness as regards count 12, to testify falsely that he had been promised nothing by the government in return for his testimony. The district court, after an evidentiary hearing, denied the motion, finding that there had been a "misstatement" in Ward's testimony but that it had not affected the outcome of the case. The court of appeals found that the government had knowingly allowed Ward to testify incorrectly since the United States Attorney had promised, in exchange for Ward's testimony, to write a letter to the Parole Board calling Ward's cooperation to its attention. In view of the minimal prejudice required to be shown upon such a finding, the court reversed the conviction on count 12 (Pet. App. A 1–7).

2. Petitioner contends here that the court below erred in failing to consider "whether the perjured testimony could reasonably have influenced the deliberations of the jury" as to the remaining counts (Pet. 2). But the court of appeals specifically considered and rejected this contention, stating *inter alia* (Pet. App. A 7):

> The defendant also urges that this court find his conviction under all counts "tainted" by Ward's testimony. Upon careful review of the evidence, we have found otherwise. Each sub-

> stantive count of the indictment described a separate falsified accident and the mailings employed in connection with it. * * * Testimony from alleged "victims" of the accidents, from the lawyers retained by the victims, and from other participants in the schemes, in addition to documentary evidence consisting of Kaplan's records of patients' visits and medical reports readily sustain his conviction under the remaining substantive counts. The conspiracy count can be sustained on the basis of this evidence in addition to the very damaging testimony of Kaplan's secretary, Addie Frundt, and a co-defendant, one of the lawyers in the scheme, William Kaper.

The ruling below was clearly correct. The evidence showed that petitioner and others were involved in a scheme to defraud insurance companies and self-insurers by planning fake automobile and pedestrian accidents and then submitting false medical reports of injuries to the insurers. Petitioner, the only physician involved, supplied false medical reports on injuries and treatments of persons who were supposedly involved in the accidents. Other conspirators recruited persons to be the victims and staged the accidents. Several attorneys were involved in the scheme and submitted the fraudulent medical reports supplied by petitioner to the insurers for payment.

More particularly, the evidence on the affirmed substantive counts showed the following: On count one the government established that a medical report and bill signed by petitioner was submitted through the mails in October 1964 to the Allstate Insurance Com-

pany, for treatment of injuries suffered by one Shirley Ellebb in an automobile accident on August 24, 1964 (App. 68–69).[1] Ellebb testified that she was never treated by petitioner for any injuries suffered in this accident although she did receive money from the settlement of an insurance claim arising from the accident (App. 46–49). On count four the evidence showed that medical bills from petitioner for treatment of three patients for injuries suffered in an automobile accident on November 23, 1964, were submitted to the Royal Globe Insurance Company through the mails in January 1965 (App. 178–180). One of these named patients testified that she had not been in the accident and had never been to petitioner's office for treatment of any injuries suffered in the accident (App. 97–99). A second individual stated that she had been in petitioner's office following the accident but that she had not been examined by petitioner and had received no treatment whatsoever from petitioner as a result of the accident (App. 148–150). The third patient testified that she had gone to see petitioner after the accident and that petitioner did not examine her or treat her although he told her he was putting on her report that she had injured her back and her knee (App. 109–111, 123, 131).

On count seven the evidence showed that although one Joe Beckom was not involved in an accident with a Chicago Transit Authority bus, a bill from petitioner for treatments of injuries allegedly suffered by

[1] "App." designates the appellant's appendix in the court of appeals which we are lodging with the Clerk of the Court.

Beckom in this accident was submitted to the bus company through the mails in August 1965 (App. 467, 473–476). One Vance Williams testified on count ten that he had faked a fall-down accident in October 1965 and had gone to petitioner for treatment of injuries to his right hand on one occasion (App. 563–564). On the bill which was submitted to the Reliable Insurance Company through the mails in April 1966, for injuries suffered in this accident, petitioner claimed five visits for treatments of injuries to Williams' left hand (App. 439–443).

The testimony of the patients was corroborated by petitioner's secretary. She testified that petitioner authorized her to make up false medical bills and instructed her on how this was to be done so the records of treatment would match the amounts on the bills requested by the attorneys (App. 673, 676–684, 686–718, 847). She also performed fake x-rays at petitioner's direction (App. 703–711). An attorney in the fraudulent scheme also testified at length as to the working arrangement between petitioner and the attorneys who handled the accident claims (App. 212–303), including specific instances in which petitioner knowingly submitted false medical bills (App. 267), performed sham treatment and examinations (App. 301), and collected payments on such pretenses (App. 389–392).

The evidence of petitioner's complicity and involvement in the fraudulent scheme, independent of Ward's testimony, was compelling. Petitioner's claim (Pet. 15–16) that the verdict on the counts of the indict-

ment, other than count 12, was influenced to a significant degree by the testimony of Jesse Ward, who admitted on the stand to an extensive criminal record and who pleaded guilty to a charge arising out of his involvement in the scheme, cannot be reconciled with the record here.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[2] Petitioner's further effort to magnify the importance of Ward's testimony is equally unavailing. The testimony of Ward (cited at Pet. 15)—to the effect that "a relationship exist[ed] between Dr. Kaplan and Whit Johnson, an ambulance chaser who was one of the central figures in the scheme to defraud" and that "Johnson was friendly and familiar with Dr. Kaplan's staff, and had free entree to Dr. Kaplan's private office"—was confirmed by petitioner's own testimony at trial (A. 897-898, 901, 962-964, 968-969, 972). Similarly petitioner testified (App. 923, 986, 994-995, 999-1000) to "a relationship between * * * [himself] and Joe Beckom, who was named with Dr. Kaplan in several counts of the indictment * * *" (Pet. 15).

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